In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 472

CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL NO. 200, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. Its *per curiam* order (Pet. 9) is not yet officially reported. The decision and order of the National Labor Relations Board are reported at 155 N.L.R.B. No. 31 (Pet. 10–39).

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1966 (Pet. 9). The petition for a writ

232-342—66

of certiorari was filed on August 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly sustained the finding of the National Labor Relations Board that a union violated Section 8(b)(2) of the National Labor Relations Act by causing the discharge of two employees for non-payment of dues that had accrued prior to the effective date of the union security ("union shop") agreement between the union and the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are printed at pages 40–43 of the petition for certiorari.

STATEMENT

On June 1, 1959, the Allied Construction Employers Association, located in Milwaukee, Wisconsin, entered into a collective bargaining agreement with petitioner union. That agreement contained a union security clause which in terms provided that it would not be enforced "unless the requirements of State law, if any, are met" (Pet. 12). The contract expired on May 31, 1962, at which time the union called a strike (Pet. 22). A new contract, incorporating a union security clause and a proviso identical to the one in the previous contract, was executed on August 6, 1962 (Pet. 12, 22).

Insofar as relevant here, Wisconsin law permits an "all-union" or union security agreement only if there

has been a separate referendum in which two-thirds of the employees authorize the agreement (Pet. 42).[1] The union did not petition the Wisconsin Employment Relations Board for such a referendum until August 1963 (Pet. 12, 24). The election was held on August 6, and on August 14 the Wisconsin Board certified that the employees had authorized an "all-union" agreement (Pet. 12, 24).

Until the union petitioned for the referendum, it had never enforced nor threatened to enforce the union security agreement. However, two weeks before the referendum, employee Sinner, a union member who had stopped paying dues in 1959 and whose arrearage totaled $330, was warned by a union steward that he would be discharged unless he paid his back dues (Pet. 25; J.A. 25).[2] This warning was repeated about a month and a half after the referendum (Pet. 25; J.A. 91, 10–11).

On October 15, the union, by letter, requested Sinner's employer to discharge him in "accordance with our Labor Agreement" (Pet. 25; J.A. 93). On October 18, the employer received the letter and informed Sinner that he was about to be discharged (Pet. 25; J.A. 27). Sinner then went to the union's business

[1] There are two exceptions to the referendum requirement: (1) where the union security agreement has been in continuous existence since May 5, 1939; and (2) where the employees involved are engaged primarily in the building and construction industry and usually perform their duties on building and construction sites (Pet. 43). The Board found that the union, by its own actions, had indicated that these exceptions were inapplicable here (Pet. 15–16).

[2] "J.A." refers to the printed joint appendix in the court below.

office and offered to pay a new initiation fee and dues retroactive to the date of the referendum (Pet. 26; J.A. 28). The union, however, refused to accept less than $330, and the next day Sinner received a letter from his employer stating (Pet. 26; J.A. 28, 29):

> Because of our union contract, *and the recent referendum of Local 200,* we are hereby permanently discharging you from your employment effective October 21, 1963. [Emphasis added.]

Similarly, in June 1963 employee Dietrich, who had not paid union dues since 1959, was told by a union steward that "there would be a vote possibly coming up for an all union shop" and that those who were not paid up would be "dropped" or "bumped down" (Pet. 28; J.A. 74, 43–45). Dietrich agreed to pay his back dues of $264 in installments, and paid $25 before the referendum (Pet. 28; J.A. 45, 53, 75–76). In September 1963 the union steward told Dietrich that the union shop had been approved, and again warned him that he had to pay his back dues (Pet. 29; J.A. 45). Dietrich submitted two payments totalling $20, but they were returned to him on October 11, at which time he was told that this was "not a substantial amount" (Pet. 13; J.A. 46, 77). Several days later, Dietrich spoke to the union's business agent, who agreed to accept monthly installments of $25 from Dietrich's attorney (Pet. 13; J.A. 47). In the meantime, however, the union had requested Dietrich's discharge and it did nothing thereafter to withdraw or rescind the letter (Pet. 13; J.A. 14). Consequently, on October 24, Dietrich was discharged and permitted to return to work only as a "new man,"

i.e., without seniority; he was later laid off for lack of work because of his low seniority (Pet. 13–14; J.A. 48, 17).

The Board, in the light of the terms of the union security agreement itself and the fact that the union had petitioned for the State referendum and had not enforced this and similar agreements until the referendum had been conducted, found that it was the intent of the parties to defer the operation and enforcement of the union security clause until the union was certified by the Wisconsin Employment Relations Board, an event that did not occur until August 14, 1963 (Pet. 16). Since the union refused to accept less than $330 from Sinner and $264 from Dietrich, the Board further found that the union's requests for their discharge were partially based on dues delinquency prior to August 14 (Pet. 14–15). Accordingly, the Board concluded that the union caused Sinner and Dietrich to be discharged and Dietrich's seniority to be reduced because of their failure to pay union dues for a period in which the union security clause under which they were discharged was not in effect, thereby violating Section 8(b)(2) of the Act (Pet. 16).[3] The Board ordered the union to cease and desist from the unfair labor practices found, to recompense the employees for their loss of earnings, to notify their employers that it has no objection to their

[3] The Board found that the discharge of Dietrich was unlawful on the further ground that the union had in effect waived his delinquency and had agreed to permit him to pay his back dues at the rate of $25 per month (Pet. 16–17). The petition does not challenge this alternative basis for the finding respecting Dietrich.

employment, and to post appropriate notices (Pet. 18, 36–39).

The court of appeals sustained the Board's findings and enforced its order (Pet. 9).

ARGUMENT

Section 8(a)(3) of the Act permits an employer and a union to enter into an agreement requiring membership in the union as a condition of continued employment, and an employee subject to such an agreement may be discharged if he does not tender "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (Pet. 40–41).[4] This presupposes, of course, a valid and subsisting union security clause; no discharge may lawfully be effected for a dues delinquency which accrued during any period when a valid clause was not in effect.[5] The only question here is whether the Board properly concluded that the union caused employees Dietrich and Sinner to be discharged for their failure to pay dues to the union during a period when in fact the union security clause in the contract between the union and the em-

[4] If a union causes an employer to discharge an employee in violation of Section 8(a)(3), it is guilty of an unfair labor practice under Section 8(b)(2).

[5] See *National Labor Relations Board* v. *Auto Workers*, 297 F. 2d 272, 274–275 (C.A. 1); *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 839 (C.A. 2); *Colonie Fibre Co., Inc.* v. *National Labor Relations Board*, 163 F. 2d 65, 67 (C.A. 2); *National Labor Relations Board* v. *Auto Workers, Local 291*, 194 F. 2d 698, 702 (C.A. 7); *National Labor Relations Board* v. *Spector Freight System, Inc.*, 273 F. 2d 272, 276 (C.A. 8), certiorari denied, 362 U.S. 962.

ployer was not in effect. An issue of this kind, turning as it does on the facts of this particular case, does not warrant review by this Court.

In addition, it is clear that the Board's conclusion is fully supported by the record. The August 1962 contract, like its predecessor, specifically recited that the union security clause would not be enforced "unless the requirements of State law, if any, are met." In compliance with the requirements of State law, the union petitioned the Wisconsin Employment Relations Board in August 1963 for a referendum to determine whether the employers would authorize such a clause. And the union did not attempt to enforce the union security clause until it invoked the State machinery. In the light of these facts, the Board properly concluded that "it was the contractual intent of the parties to defer the operation and enforceability of the union-security clause until the requirements of the Wisconsin statute had been met" (Pet. 16). Since these requirements were not satisfied until August 14, 1963, and the bulk of the dues sought by the union from Dietrich and Sinner had accrued prior to that date, the Board was warranted in concluding that the union had caused them to be discharged for dues delinquency during a period when no valid union security clause was in effect.

There is no inconsistency between the Board's decision in this case and *Retail Clerks International Assoc.* v. *Schermerhorn*, 375 U.S. 96 (Pet. 5). This Court held there that Section 14(b) of the Act (Pet. 42) empowers the States to impose restrictions on union security agreements beyond those imposed

by federal law and to enforce these additional restrictions. Contrary to petitioner, the Board did not engraft the requirements of Wisconsin law onto the union security clause here nor undertake to enforce those requirements. The Board merely gave effect to the contractual intent of the parties, *i.e.*, to make the effectiveness of the union security clause contingent upon certification by the State Board. Nothing in *Schermerhorn* precludes the Board from determining the factual question of when the parties meant the clause to take effect. Were it otherwise, the limitations in Sections 8(a)(3) and 8(b)(2) of the Act upon employer and union discrimination by reason of union non-membership would be largely meaningless.

CONCLUSION

The petition for certiorari should be denied.
Respectfully submitted.

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